No. 13-132

IN THE

Supreme Court of the United States

DAVID LEON RILEY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari
to the California Court of Appeal,
Fourth Appellate District

BRIEF FOR PETITIONER

Jeffrey L. Fisher
Counsel of Record
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

Patrick Morgan Ford
LAW OFFICE OF PATRICK
MORGAN FORD
1901 First Avenue
Suite 400
San Diego, CA 92101

Donald B. Ayer
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001

QUESTION PRESENTED

Whether evidence admitted at petitioner's trial (namely, certain digital photographs and videos) was obtained in a search of petitioner's cell phone that violated petitioner's Fourth Amendment rights.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

BRIEF FOR PETITIONER 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISION 1

INTRODUCTION 2

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. The Search Of The Digital Contents Of Petitioner's Smart Phone Exceeded The Bounds Of A Legitimate Search Incident To Arrest 13

A. The Search Was Unnecessary To Serve Any Legitimate Governmental Interest 15

1. Digital Data Does Not Threaten Officer Safety 16

2. Once Seized, It Is Unnecessary To Search A Smart Phone Without A Warrant To Preserve Evidence 20

B. The Degree of Intrusiveness Of The Search Of Petitioner's Phone Rendered The Search Unreasonable 24

1. Smart Phones Hold Extraordinary Amounts Of Sensitive Personal Information 26

2. Smart Phones Hold Information That Implicates First Amendment Concerns 31

C. Limiting Searches Of Smart Phones To Situations In Which Officers Believe Such Phones Contain Evidence Of The Crime Of Arrest Would Not Solve The Constitutional Problems Inherent In Such Searches 38

II. The Search Of Petitioner's Phone At The Stationhouse Was Too Remote From His Arrest To Qualify As A Search Incident To Arrest 44

CONCLUSION 53

TABLE OF AUTHORITIES

Page(s)

Cases

A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) 33

Abel v. United States, 362 U.S. 217 (1960) 49

Agnello v. United States, 269 U.S. 20 (1925) 45

Arizona v. Gant, 556 U.S. 332 (2009) .... *passim*

Arkansas v. Sanders, 442 U.S. 753 (1979) 20

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) 3

Bailey v. United States, 133 S. Ct. 1031 (2013) 45

Boyd v. United States, 116 U.S. 616 (1886) .... *passim*

Cardwell v. Lewis, 417 U.S. 583 (1974) 39, 40, 47

Carroll v. United States, 267 U.S. 132 (1925) 39

Chambers v. Maroney, 399 U.S. 42 (1970) 46

Chimel v. California, 395 U.S. 752 (1969) .... *passim*

City of Indianapolis v. Edmond, 531 U.S. 32 (2000) 34

City of Ontario v. Quon, 560 U.S. 746 (2010) 37

Commonwealth v. Pierre, 893 N.E.2d 378 (Mass. App. Ct. 2008) 47

Cooper v. California, 386 U.S. 58 (1967) 50

D'Antorio v. State, 926 P.2d 1158 (Alaska 1996) 51

Diaz v. California, 132 S. Ct. 94 (2011) 9

Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968) 46

Entick v. Carrington, (1765) 95 Eng. Rep. 807 (C.P), 19 How. St. Tr. 1029 .... 32, 34

Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) 19

Harris v. United States, 331 U.S. 145 (1947)........... 35

Illinois v. Lafayette, 462 U.S. 640 (1983) 50

Illinois v. McArthur, 531 U.S. 326 (2001) 20

Interstate Commerce Comm'n v. Brimson, 154 U.S. 447 (1894) 32

Katz v. United States, 389 U.S. 347 (1967)........ 14, 15

Knowles v. Iowa, 525 U.S. 113 (1998) 16

Kyllo v. United States, 533 U.S. 27 (2001)......... 13, 14

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) 33

Marcus v. Search Warrant, 367 U.S. 717 (1961) 32, 33

Maryland v. Garrison, 480 U.S. 79 (1987)................ 31

Maryland v. King, 133 S. Ct. 1958 (2013) 24, 25, 26, 28, 30

Missouri v. McNeely, 133 S. Ct. 1552 (2013) 20

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 33

Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989) 30

New York v. Belton, 453 U.S. 454 (1981) 17, 19, 44

Newhard v. Borders, 649 F. Supp. 2d 440 (W.D. Va. 2009) 37

Pennsylvania v. Labron, 518 U.S. 938 (1996) 39

People v. Diaz, 244 P.3d 501 (Cal. 2011))..........*passim*

People v. McKay, 41 P.3d 59 (Cal. 2002) 2

People v. Redmond, 390 N.E.2d 1364
(Ill. App. Ct. 1979) 47
Preston v. United States,
376 U.S. 364 (1964) 44, 45, 46, 47
Roaden v. Kentucky, 413 U.S. 496 (1973) 17, 44
Shipley v. California, 395 U.S. 818 (1969) 44
Sibron v. New York, 392 U.S. 40 (1968) 17
South Dakota v. Opperman,
428 U.S. 364 (1976) 39, 51
Stanford v. Texas, 379 U.S. 476 (1965) 32, 33
State v. Davis, 742 P.2d 1356
(Ariz. Ct. App. 1987).. 51
State v. Granville, ___ S.W.3d ___, 2014 WL
714730 (Tex. Crim. App. Feb. 26, 2014)....... 28, 29
State v. Isaac, 209 P.3d 765, No. 101,230,
2009 WL 1858754 (Kan. Ct. App. 2009) 44
State v. Murray, 605 A.2d 676 (N.H. 1992)............. 47
State v. Smith, 920 N.E.2d 949 (Ohio 2009) 8
Thornton v. United States, 541 U.S. 615 (2004)...... 16
Tobe v. City of Santa Ana,
892 P.2d 1145 (Cal. 1995) 2
United States v. $639,558 in U.S. Currency,
955 F.2d 712 (D.C. Cir. 1992) 47
United States v. Bennett, 409 F.2d 888
(2d Cir. 1969)... 36
United States v. Butler, 904 F.2d 1482
(10th Cir. 1990) 47
United States v. Chadwick, 433 U.S. 1 (1977) ..*passim*

United States v. DiMarco, No. 12 CR 205(RPP), 2013 WL 444764 (S.D.N.Y. 2013) 44

United States v. Edwards, 415 U.S. 800 (1974) .... *passim*

United States v. Flores-Lopez, 670 F.3d 803 (7th Cir. 2012) 22

United States v. Gibson, No. CR 11-00734 WHA, 2012 WL 1123146 (N.D. Cal. 2012) 44

United States v. Jones, 132 S. Ct. 945 (2012) 14, 33, 41

United States v. Kirschenblatt, 16 F.2d 202 (2d Cir. 1926) 29, 35, 36

United States v. Lefkowitz, 285 U.S. 452 (1932) 30, 34, 35

United States v. Montalvo-Cruz, 662 F.2d 1285 (9th Cir. 1981) 47

United States v. Morales, 923 F.2d 621 (8th Cir. 1991) 47

United States v. Place, 462 U.S. 696 (1983) 20

United States v. Robinson, 414 U.S. 218 (1973) .... *passim*

United States v. Robinson, 471 F.2d 1082 (D.C. Cir. 1972) (en banc) 18

United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978) 47

United States v. Vasey, 834 F.2d 782 (9th Cir. 1987) 47

United States v. Wurie, 724 F.3d 255 (1st Cir. 2013) 25

United States v. Wurie,
728 F.3d 1 (1st Cir. 2013)............................*passim*

United States v. Yockey, No. CR09-4023-MWB,
2009 WL 2400973 (N.D. Iowa 2009).................. 44

Vernonia Sch. Dist. 47J v. Acton,
515 U.S. 646 (1995) 14, 15, 24

Weems v. United States, 217 U.S. 349 (1910).......... 14

Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (C.P.),
19 How. St. Tr. 1153.. 32

Williams v. District of Columbia,
439 F. Supp. 2d 34 (D.D.C. 2006) 20

Wyoming v. Houghton, 526 U.S. 295 (1999) 25, 39

Zurcher v. Stanford Daily, 436 U.S. 547 (1978) 33

Constitutional Provisions

U.S. Const., amend. I............................ 11, 25, 31, 33

U.S. Const., amend. IV ....*passim*

Statutes

18 U.S.C. §§ 2511-2522... 52

18 U.S.C. § 2701.. 52

18 U.S.C. § 2703(a) 52

28 U.S.C. § 1257(a) 1

Cal. Penal Code § 186.22(b)(4)(B) 9

Cal. Penal Code § 246 9

Cal. Penal Code § 12025(a)(1) 43

Cal. Penal Code § 12031(a)(1) 43

Cal. Penal Code § 25400(a)(1) 43

Cal. Penal Code § 25850(a)(1) 43

Other Authorities

Apple, *Apple – iPhone 5s – Technical Specifications* 42

Apple, *iCloud Photo Sharing* 53

Brady, Surell, *Arrests Without Prosecution and the Fourth Amendment*, 59 Md. L. Rev. 1 (2000) 2

Brown, Edmund G., Governor, Letter to Members of California State Senate (Oct. 9, 2011) 9

Cal. Dep't of Justice, Bureau of Forensic Servs., Physical Evidence Bulletin: Digital Evidence Collection – Mobile Devices (2011) 23

Dep't of Justice Computer Crime and Intellectual Prop. Section, Cybercrime Lab, Awareness Brief: Find My iPhone (2009) 23

Digital Photos Taken by Americans, Nat'l Geographic, April 2012 41

Dripps, Donald A., *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. Crim. L. & Criminology 49 (2013) 34, 36

Fed. Bureau of Investigation, Crime in the United States (2012) 2

Gershowitz, Adam M., *Seizing a Cell Phone Incident to Arrest: Data Extraction Devices, Faraday Bags, or Aluminum Foil as a Solution to the Warrantless Cell Phone Search Problem*, 22 Wm. & Mary Bill Rts. J. 601 (2013) 23, 24

Harris, Kamala D., Cal. Dep't of Justice, Crime in California (2012) 2

LaFave, Wayne R., Search and Seizure (5th ed. 2012).. 3

Miller, Christa, et al., *What's in an App? Extracting and Examining Mobile Device App Data*, Evidence Tech. Mag. (Nov.– Dec. 2013)... 24

N.Y. Div. of Criminal Justice Servs., Adult Arrests: 2003-2012 (2013)................................... 2

Orso, Matthew E., *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 Santa Clara L. Rev. 183 (2010) 27

Samsung, *Samsung Galaxy S4 – Life Companion*... 42

Samsung, *Samsung Instinct Touchscreen Cell Phone* 5, 22

Samsung, Samsung Instinct User Guide (2008) 22, 27, 41

Schnapper, Eric, *Unreasonable Searches and Seizures of Papers*, 71 Va. L. Rev. 869 (1985) 34, 36

Shankland, Stephen, *How Google Is Becoming an Extension of Your Mind*, CNET (July 16, 2012)... 27

Wood, Molly, *Narcissist's Dream: Selfie-Friendly Phone*, N.Y. Times, Feb. 6, 2014 41

BRIEF FOR PETITIONER

Petitioner David Leon Riley respectfully requests that this Court reverse the judgment of the California Court of Appeal.

OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. 1a) is unpublished but can be found at 2013 WL 475242. The order of the California Supreme Court denying review (Pet. App. 24a) is unpublished. The relevant trial court proceedings and order are unpublished.

JURISDICTION

The California Supreme Court denied review on May 1, 2013. Pet. App. 24a. This Court granted a writ of certiorari on January 17, 2014. 134 S. Ct. 999 (2014). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment states in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."

INTRODUCTION

Every day across the country, thousands of people are arrested – a reality that results in over twelve million people being arrested each year,[1] a majority of whom are never convicted of any crime. Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 Md. L. Rev. 1, 3 (2000). While some of these arrests arise from felony investigations, the vast majority are for alleged misdemeanors such as driving under the influence, simple assault, or petty theft. In California, for example, about two-thirds of adult arrests are for misdemeanors;[2] in New York, almost three-fourths are for misdemeanors.[3]

What is more, in California as in most other states, the police may – and sometimes do – arrest people for traffic and other "fine only" infractions such as jaywalking, littering, or riding a bicycle the wrong direction on a residential street. *People v. McKay*, 41 P.3d 59, 62-63 (Cal. 2002); *Tobe v. City of*

---

[1] Fed. Bureau of Investigation, Crime in the United States 2012 tbl.29 (2012), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/29tabledatadecpdf.

[2] Kamala D. Harris, Cal. Dep't of Justice, Crime in California 2 (2012), *available at* http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd12/cd12.pdf. By far, the most common offense of arrest is driving under the influence. Over 15% of total arrests in recent years (about 200,000 per year) are for DUI. *Id.* at 19 tbl.18, 29 tbl.26.

[3] N.Y. Div. of Criminal Justice Servs., Adult Arrests: 2003-2012 (2013), *available at* http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYorkState.pdf.

Santa Ana, 892 P.2d 1145, 1178 (Cal. 1995); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 354-55 (2001). Indeed, given that "very few drivers can traverse any appreciable distance without violating some traffic regulation, . . . it is apparent that virtually everyone who ventures out onto the public streets and highways may then, with little effort by the police, be placed in a position where he is subject to a full search." 3 Wayne R. LaFave, Search and Seizure § 5.2(e), at 156 (5th ed. 2012) (internal quotation marks and citation omitted).

According to the California Supreme Court, every time the police effectuate one of these arrests and searches, officers may not only seize and secure any smart phone the arrestee is carrying but also may rummage through the digital contents of the device. *See People v. Diaz*, 244 P.3d 501 (Cal. 2011) (reprinted at Pet. App. 25a-65a). Furthermore, the police may undertake such warrantless examinations not only briefly at the scene of arrest but also later at the police station after booking the arrestee. *Diaz*, Pet. App. 33a.

This case concerns whether granting such a new police entitlement comports with the Fourth Amendment. The stakes are high: Americans use smart phones to generate and store a vast array of their most sensitive thoughts, communications and expressive material. Because the abiding purpose of the Fourth Amendment is to safeguard such personal and professional information from exploratory searches, this Court should hold that even when officers seize smart phones incident to lawful arrests, they may not search the phones' digital contents without first obtaining a warrant.

STATEMENT OF THE CASE

1. Early in the morning on August 22, 2009, the police pulled over petitioner David Riley, a local college student, who was driving his Lexus near his home in the Lincoln Park neighborhood of San Diego. The officer who initiated the stop, Charles Dunnigan, told petitioner that he had pulled him over for having expired tags. Pet. App. 3a, 5a. Officer Dunnigan soon learned that petitioner was driving with a suspended license. The officer thus decided to impound petitioner's car.

At the inception of an impound, San Diego Police Department policy requires officers to conduct an inventory search of the vehicle in order to document its contents. Pet. App. 5a. Officer Dunnigan called in another officer to assist with this task. J.A. 5-6. During the inventory search, the officers looked under the car's hood and discovered two firearms. Pet. App. 3a, 6a. Based on this discovery, Officer Dunnigan placed petitioner under arrest for carrying concealed and loaded weapons. *Id.* 6a.

During the arrest, Officer Dunnigan seized petitioner's cell phone from his pants pocket. Pet. App. 5a, 15a.[4] According to a "phone examination report" that the State provided during discovery, the

---

[4] Some testimony presented at trial suggested that petitioner's phone might have been sitting on the seat of his car instead of in his pocket at the time of arrest. Pet. App. 15a. But the trial court found that "the cell phone . . . was on [Riley's] person at the time of the arrest," and the California Court of Appeal treated that finding as binding for purposes of appeal. *Id.* Accordingly, petitioner proceeds here on the basis of that finding as well.

phone was a Samsung SPH-M800 Instinct "smart phone." This touch-screen device – designed to compete with Apple's original iPhone and the iPhone 3G – is capable of accessing the internet, capturing and storing photos and videos, providing and storing GPS location information, and capturing and storing both voice and text messages, among other features. *Samsung Instinct Touchscreen Cell Phone: Features*, Samsung, http://www.samsung.com/us/mobile/cell-phones/SPH-M800ZKASPR-features.

After seizing petitioner's phone, officers performed a two-stage warrantless search of its digital contents. First, Officer Dunnigan scrolled through the phone's "text entries" at the scene. BIO 1, 12. He noticed that some words (apparently in text messages and the phone's contacts list) normally beginning with the letter "K" were preceded by the letter "C." *Id.*; Pet. App. 6a; J.A. 8. Having already noticed other indications (such as the colors on petitioner's key chain) that petitioner might be connected with a criminal gang, Officer Dunnigan believed that the "CK" prefix referred to "Crip Killers," a slang term for members of a gang known as the "Bloods." J.A. 8.

The second search of petitioner's phone took place "about two hours later" at the police station. BIO 2. After the arresting officers booked petitioner, Detective Duane Malinowski, a detective specializing in gang investigations, took him upstairs to an interview room and attempted to interrogate him. Petitioner was nonresponsive. Detective Malinowski then released petitioner back to the arresting officers and retrieved the property they had seized from him

at the time of arrest, including his smart phone. J.A. 15-16.

As Detective Malinowski later explained, he "went through" and downloaded "a lot of stuff" on the phone "looking for evidence." J.A. 11, 14, 20. It is unclear how many different digital files on the phone Detective Malinowski reviewed. But at a minimum, he looked through the digital files containing photographs, watched numerous videos, and reviewed the phone's collection of phone numbers. *Id.* 30-31. "[O]ne of the things that caught [his] eye" were videos of "street boxing" – that is, friends sparring with each other with bare hands, taking care not to really hurt each other. *Id.* 11, 17. Petitioner was not among those street boxing in the videos, but Detective Malinowski believed that he could hear him in the background shouting gang-like terms, such as "Come on Lincoln" and "Get him blood." *Id.* 13. Detective Malinowski also found a few photos of petitioner with another young man, both allegedly making hand signals indicating gang membership. In the background of these photos, reproduced at J.A. 42-44, Detective Malinowski noticed a red Oldsmobile that the police suspected had been involved in a prior shooting.

In that incident, three individuals fired several shots at a passing car before reportedly fleeing in a red Oldsmobile. The police believed the shooting was gang related. After finding the photos on petitioner's phone indicating that he owned a red Oldsmobile and that he was connected to gang activity, and after ballistics testing suggested that the firearms seized during petitioner's traffic stop were used in the

shooting incident, law enforcement came to believe that petitioner had been involved in that altercation.

2. The State ultimately charged petitioner and two others with shooting at an occupied vehicle, assault with a semi-automatic firearm, and attempted murder.[5] The State also alleged that petitioner committed these crimes for the benefit of a criminal street gang – an allegation that not only rendered the potentially inflammatory evidence of petitioner's alleged gang membership admissible (and, indeed, highly relevant) at trial, but also exposed him under California law to a significantly enhanced sentence. The two co-defendants eventually pleaded guilty to involvement in the crime, but petitioner insisted on his innocence.

Prior to trial, petitioner moved to suppress all of the evidence the police had obtained during the searches of his cell phone. Tr. at 269-70. As is pertinent here, petitioner argued that the search of his cell phone violated the Fourth Amendment because it was performed without a warrant and without any exigency otherwise justifying the search. *Id.* The trial judge rejected this argument, ruling that the searches were legitimate searches incident to arrest. Pet. App. 7a-8a. The trial ended in a hung jury, but the State elected to retry petitioner.

---

[5] The State separately charged petitioner in conjunction with the traffic stop with carrying a concealed firearm in a vehicle, carrying a loaded firearm, and receiving stolen property. Petitioner pleaded guilty to all three charges and was sentenced to four years in prison. Those convictions are not at issue here.

During the second trial (as at the first), none of the State's four eyewitnesses could identify petitioner as one of the shooters. The State, therefore, relied on circumstantial evidence to connect petitioner to the crime. Among other things, the State again sought to show the jury the photos of petitioner posing in front of the Oldsmobile with one of the co-defendants. J.A. 35-40, 42-44. In addition, the State sought to rely on the videos from petitioner's cell phone showing street boxing fights involving both co-defendants, in which petitioner could be heard in the background encouraging the co-defendants and shouting supposedly gang-related comments. *Id.* 40-41.

The trial court again ruled the evidence was admissible, J.A. 26 (ruling); *id.* 30-31, 40-41 (introduction of evidence), this time basing its ruling on the California Supreme Court's decision in *People v. Diaz*, 244 P.3d 501 (Cal. 2011). In that decision – which was announced between the two trials here, and which is reproduced at Pet. App. 25a-65a – the California Supreme Court held by a 5-2 vote that the Fourth Amendment's search-incident-to-arrest doctrine permits the police to conduct a full exploratory search of a cell phone (even some time later at the stationhouse) whenever the phone is immediately associated with the arrestee's person at the time of the arrest. *Diaz*, Pet. App. 33a-34a. The majority acknowledged that the Ohio Supreme Court had reached a contrary conclusion. *Id.* 47a n.17. That court reasoned that "modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object" that might otherwise be seized incident to arrest. *State v. Smith*, 920 N.E.2d 949, 954 (Ohio 2009). But the California Supreme Court insisted that only this

Court has the power to consider how its jurisprudence dealing with physical containers should apply to the "modern technology" of the digital age. *Diaz*, Pet. App. 47a.[6]

The jury ultimately convicted petitioner on all three charges. Pursuant to California law, the trial court activated only petitioner's sentence for the conviction that carried the longest sentence, shooting at an occupied vehicle, and stayed petitioner's sentences for the two other convictions. Without the gang enhancement, this crime is punishable by a maximum of seven years in prison. Cal. Penal Code § 246. With the enhancement, however, petitioner's conviction for shooting at an occupied vehicle required the court to sentence him to fifteen years to life in prison. Pet. App. 1a; *see also* Cal. Penal Code § 186.22(b)(4)(B).

---

[6] Mr. Diaz filed a petition for a writ of certiorari challenging the California Supreme Court's holding. Shortly thereafter, the California Legislature overwhelmingly passed a bill requiring the police to obtain a warrant before searching the contents of any "'portable electronic devices,' including cellular telephones." Supp. Br. to Br. in Opp. 1, *Diaz v. California*, 132 S. Ct. 94 (2011) (No. 10-1231), 2011 WL 4366007, at *1 (describing Senate Bill 914 (2011)). After the State brought the bill to this Court's attention, *see id.*, the Court denied review. 132 S. Ct. 94 (2011). One week later, California Governor Jerry Brown vetoed the state legislature's bill, stating that the "courts are better suited to resolve the complex and case-specific issues relating to constitutional search-and-seizures protections." Letter from Edmund G. Brown Jr., Governor, to Members of the California State Senate (Oct. 9, 2011), *available at* http://gov.ca.gov/docs/SB_914_Veto_Message.pdf.

3. The California Court of Appeal affirmed the judgment. As is relevant here, the court held that "*Diaz* controls the present case" because the cell phone was "immediately associated with [petitioner's] person" at the time of his arrest. Pet. App. 15a (internal quotation marks and citation omitted).

4. Petitioner sought discretionary review in the California Supreme Court. As is pertinent here, he renewed his argument that the warrantless searches of his cell phone violated the Fourth Amendment. Pet. for Review at 13-20. The California Supreme Court denied review without comment. Pet. App. 24a.

SUMMARY OF ARGUMENT

The warrantless search of the digital contents of petitioner's smart phone violated the Fourth Amendment.

I. Searching the digital contents of a smart phone furthers neither of the governmental interests that justifies searches incident to arrest and impinges upon personal privacy to an unprecedented degree.

A. Police officers may conduct warrantless searches incident to arrest in order to search for weapons and to prevent the destruction of evidence. Neither of those concerns, however, is implicated here. Unlike physical items inside of a container, the digital contents of a smart phone are categorically incapable of threatening officer safety. And once the police have seized and secured a smart phone, there is no risk that the arrestee might destroy or alter its digital contents. Nor should there be any danger that a third party might do so; so long as the police prevent the phone from receiving a signal – for example, by placing it into a Faraday bag – the

digital contents of the device will remain frozen while the police decide whether to seek a warrant.

B. Searching text, photo, and video files within smart phones – as the police did here – severely impinges upon personal privacy. Such files hold exponentially greater amounts and types of sensitive personal information than any physical item an arrestee could carry on his person. Furthermore, much of that information implicates First Amendment concerns, such as free expression, private communication, and associational interests.

Indeed, subjecting smart phones seized at the time of arrest to exploratory searches at the whim of police officers would strike at the heart of the Fourth Amendment's fundamental concerns. The Framers incorporated the prohibition against unreasonable searches into the Bill of Rights primarily in response to the odious colonial-era practice of executing general warrants – warrants that enabled officers to rummage though people's homes and offices for whatever incriminating items they might find. Such searches were deemed particularly problematic when directed at people's "private papers" or other expressive documents.

Searching through a smart phone's text, photo, and video files would be the modern equivalent of such a general search. Before the development of smart phones, people kept the information stored on such devices – if it existed in tangible form at all – only in the most private recesses of their homes or offices, safely beyond the reach of any search that might occur incident to arrest. The information on smart phones is also profoundly expressive. It reveals the thoughts, wonders, and concerns of a

phone's owner – as well as of those with whom the owner has interacted in various ways. The protection the Fourth Amendment has always afforded to such writings and other expression should not evaporate – more than two hundred years after the Founding – simply because that information can now be reduced to electronic charges in a computer chip and carried in one's pocket.

C. Limiting searches of smart phones to situations where officers have a reasonable belief that such phones contain evidence of the crime of arrest would not solve the constitutional problems inherent in such searches. The reasonable-belief exception applies only in the unique context of automobile searches. Even if this Court were open to the possibility of extending that exception to other kinds of searches incident to arrest, the exception would be especially ill-suited to smart phones. Precisely because the digital contents of such devices contain virtually limitless amounts of information concerning people's daily activities and personal connections, an officer could almost always claim that he reasonably believed that he might find relevant evidence *somewhere* in a phone. Incessant litigation would ensue, and the exception, for all practical purposes, would swallow the rule.

II. Even if police officers could generally search the digital contents of smart phones seized during arrests, the search of petitioner's phone at the stationhouse still violated the Fourth Amendment because it was not truly "incident" to arrest. The search-incident-to-arrest doctrine condones warrantless searches only when performed substantially contemporaneous with the arrest and in

the immediate vicinity of the arrest. The search here satisfied neither requirement. It was conducted some two hours after petitioner's arrest and after he was booked at the stationhouse. Under these circumstances, there can be no doubt that the police had ample ability to seek a warrant before examining material on petitioner's smart phone. Their failure to do so rendered the search unreasonable.

ARGUMENT

I. The Search Of The Digital Contents Of Petitioner's Smart Phone Exceeded The Bounds Of A Legitimate Search Incident To Arrest.

In the decision that dictated the outcome below, the California Supreme Court asserted that "binding precedent" from the pre-digital age left it no choice but to treat searches of smart phones seized at the time of arrests identically to searches of purely physical objects. *People v. Diaz*, 244 P.3d 501, 511 (Cal. 2011) (reprinted at Pet. App. 25a, 47a); *see also id.* 51a (Kennard, acting C.J., concurring) (agreeing with the majority's approval of unrestricted cell phone searches "[u]nder the compulsion of directly applicable United States Supreme Court precedent").

But as this Court has repeatedly noted, "it would be foolish" to contend that the Fourth Amendment cannot take account of "the advance of technology." *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001). When a modern innovation gives law enforcement the ability to obtain personal information formerly beyond its reach, that "practical" reality requires this Court to assess the legality of the police practice at issue not only in light of prior case law but also, more generally, in terms of the timeless concerns

underlying the Fourth Amendment. *United States v. Jones*, 132 S. Ct. 945, 963-64 (2012) (Alito, J., concurring in the judgment) (GPS technology); *see also id.* at 955-57 (Sotomayor, J., concurring); *Kyllo*, 533 U.S. at 33-34 (infrared imaging); *Katz v. United States*, 389 U.S. 347, 352-53 (1967) (listening in on telephone calls). "Under any other [approach] a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas." *Weems v. United States*, 217 U.S. 349, 373 (1910).

Put another way, this Court must remain ever alert to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, 533 U.S. at 34. That obligation requires this Court to judge the legality of warrantless searches of a sort that the Framers could not have contemplated and that this Court has never considered against the traditional Fourth Amendment inquiries into (A) whether the searches further any legitimate governmental interest; and (B) the degree to which such searches impinge upon personal privacy. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995). Law developed with only physical objects in mind cannot be woodenly applied to digital files containing virtually limitless amounts of information – especially when most of that information would formerly have been stored in places, such as one's home, that were safe from government intrusion without a warrant.

For the reasons described below, warrantless searches of smart phones fail to further any legitimate law enforcement interest related to effectuating arrests. Such searches also impinge upon personal privacy to an unprecedented degree. Consequently, the Fourth Amendment's search-incident-to-arrest doctrine should not countenance such warrantless searches.

A. The Search Was Unnecessary To Serve Any Legitimate Governmental Interest.

"[E]very case addressing the reasonableness of a warrantless search [begins] with the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz*, 389 U.S. at 357); *see also Acton*, 515 U.S. at 653 ("Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant."). "Among the exceptions to the warrant requirement is a search incident to a lawful arrest." *Gant*, 556 U.S. at 338.

This Court's modern search-incident-to-arrest jurisprudence emanates from *Chimel v. California*, 395 U.S. 752, 762-63 (1969), and *United States v. Robinson*, 414 U.S. 218, 234 (1973). In those cases, this Court explained that police officers may search an arrestee's person and the immediate vicinity in order to further two governmental interests: (1) to identify and "remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his

escape" and (2) to "seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Chimel*, 395 U.S. at 762-63; *see also Robinson*, 414 U.S. at 234 ("The justification or reason for the authority to search incident to a lawful arrest" rests upon "the need to disarm the suspect" and "the need to preserve evidence on his person.").

At the same time, this Court has stressed that "conducting a *Chimel* search is not the Government's right; it is an exception – justified by necessity." *Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring in the judgment). When "there is no possibility" that the arrestee could gain access to a weapon or destroy evidence, "both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Gant*, 556 U.S. at 339; *see also Knowles v. Iowa*, 525 U.S. 113, 118-19 (1998) (refusing to extend the search-incident-to-arrest doctrine to the issuances of citations because "the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all").

Such is the case here: The digital contents of a smart phone cannot threaten officer safety, and there is no need to search such data to protect against the destruction of evidence.

1. Digital Data Does Not Threaten Officer Safety.

Once police seize a smart phone and have it securely in their possession, it is perfectly reasonable for officers to inspect the physical components of the phone (including any protective cover or case) to ensure that it does not pose a safety threat. But once that task is complete, there is no need to examine the

phone's *digital* contents – a series of ones and zeros stored electronically on computer chips – to protect against the arrestee resisting arrest or escaping.

In its decision in *Diaz* the California Supreme Court never disputed this reality. But it deemed it immaterial. Quoting language from this Court's opinion in *Robinson*, the California Supreme Court reasoned that when the police seize property from the person of an arrestee, "[i]t is the fact of the lawful arrest" – not any safety or other concern – "which establishes the authority to search." *Diaz*, Pet. App. 30a (quoting *Robinson*, 414 U.S. at 235).

This Court has cautioned, however, that the precedential force of any given Fourth Amendment decision depends on "the concrete factual context of the individual case." *Sibron v. New York*, 392 U.S. 40, 59 (1968); *see also Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) ("A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material."). In *Gant*, for instance, the State of Arizona argued – based on categorical-sounding language in this Court's decision in *New York v. Belton*, 453 U.S. 454 (1981) – that the Fourth Amendment permitted the police to search an arrestee's vehicle incident to arrest "even if there [were] no possibility the arrestee could gain access to the vehicle at the time of the search." *Gant*, 556 U.S. at 341. This Court rejected the argument, explaining that even though *Belton* could be read in that manner, the case had to be understood in the setting in which it arose, involving the exigency of "a single officer confronted with four unsecured arrestees." *Gant*, 556 U.S. at 344. Any other reading would have

"untether[ed] the rule [of *Belton*] from the justifications underlying the *Chimel* exception." *Gant*, 556 U.S. at 343.

The California Supreme Court made the same mistake here that the State of Arizona made in *Gant*. In *Robinson*, this Court upheld a search incident to arrest of an arrestee's person, which included an officer's inspection of a crumpled cigarette package found in the arrestee's shirt pocket. 414 U.S. at 235-36. Once the officer seized the package from the arrestee, there was no risk that any evidence inside could be destroyed. But, as the government explained and the dissenting judges in the court of appeals noted, "further inspection of the package was still justifiable as a protective measure" because the arrestee was standing immediately in front of the officer and the package might have contained "a razor blade," "live bullets," or even a pin. *United States v. Robinson*, 471 F.2d 1082, 1118 (D.C. Cir. 1972) (en banc) (Wilkey, C.J., dissenting); *see also* Br. for United States at 9-11, *Robinson*, 414 U.S. 218 (No. 72-936) (arguing that search of cigarette package was "justified by the inherent dangers to the safety to police" and that "the potential for danger was not abated until [the officer] examined it and discovered, not a weapon, but heroin").

Robinson thus presented no occasion to sever the search-incident-to-arrest doctrine forevermore from its conceptual underpinnings. Rather, that decision rested on the understanding that officers must make "quick ad hoc judgment[s]" when arresting people. *Robinson*, 414 U.S. at 235. And some chance – however small – always exists that an arrestee's body or a container of physical items taken from his person

might hold a weapon or device that could be used to effectuate an escape. *Id.*; *see also Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1519 (2012) (observing that the human body can "conceal[] knives, scissors, razor blades, glass shards, and other prohibited items"); *United States v. Edwards*, 415 U.S. 800, 805 (1974) (noting that "at the time and place of the arrest" police officers may seize and examine arrestee's clothing). That being so, it would be unfair for courts to engage in "case-by-case adjudication" to determine "the probability in a particular arrest" that an arrestee or container on his person poses such a threat. *Robinson*, 414 U.S. at 234. Insofar as the physical universe is concerned, "the fact of custodial arrest [itself] gives rise to the authority to search." *Id.* at 236.

There is zero chance, however, that the digital contents of a smart phone can threaten officer safety. Unlike an arrestee's body or objects that this Court has characterized as "container[s]" – that is, "object[s] capable of holding another object" like a pin or razor blade, *Belton*, 453 U.S. at 460 n.4 – a smart phone does not hold any physical objects at all. It simply stores digital data, something that is plainly and categorically incapable of posing a danger to officers. In this situation, the teaching of *Gant* is that once the arrestee and the smart phone are securely in police custody, *Chimel's* safety rationale "does not apply." 556 U.S. at 339.[7]

---

[7] The facts of *Robinson* also differ from the situation here in another respect. The government explained at oral argument in the case that if there had been nothing problematic inside the cigarette package, the officer would have immediately "given it

2. Once Seized, It Is Unnecessary To Search A Smart Phone Without A Warrant To Preserve Evidence.

Nor is it necessary to rummage through a smart phone's digital contents without seeking a warrant in order to prevent the destruction of evidence. It is hornbook law that the Fourth Amendment permits officers to secure spaces and seize items "where needed to preserve evidence until police could obtain a warrant." *Illinois v. McArthur*, 531 U.S. 326, 334 (2001) (home); *see also United States v. Place*, 462 U.S. 696, 706 (1983) (luggage); *Arkansas v. Sanders*, 442 U.S. 753, 766 (1979) (containers inside a car). And police officers can now obtain warrants in a matter of hours and sometimes minutes. *Missouri v. McNeely*, 133 S. Ct. 1552, 1562-63 (2013). Thus, the search-incident-to-arrest doctrine permits searching an item to preserve evidence only when a seizure alone is "[in]sufficient to guard against any risk that evidence might be lost" during the hours or minutes necessary to obtain a warrant. *United States v. Chadwick*, 433 U.S. 1, 13 (1977).

---

back" to the arrestee. Oral Arg. at 26:20, *Robinson*, 414 U.S. 218 (No. 72-936) *available at* http://www.oyez.org/cases/1970-1979/1973/1973_72_936; *see also Robinson*, 414 U.S. at 259 n.7 (Marshall, J., dissenting) (noting this explanation). (After all, the case arose in the early 1970s, when people carried cigarettes everywhere, including inside jails. *See, e.g.*, *Williams v. District of Columbia*, 439 F. Supp. 2d 34, 38 (D.D.C. 2006) (noting the D.C. jail allowed inmates to smoke until 1992).) An officer in the situation here would never return a smart phone and allow the arrestee to take it with him into jail.

In *Chadwick*, for instance, this Court held that the search-incident-to-arrest doctrine did not allow officers to inspect the contents of a footlocker seized from an arrestee. Once it was clear that the officers had "exclusive control" over the footlocker and "there [was] no longer any danger that the arrestee might gain access to the property," it was "unreasonable to undertake the additional and greater intrusion of a search without a warrant." 433 U.S. at 13, 15. Likewise, in *Gant* this Court held that the *Chimel* doctrine "does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle." 556 U.S. at 335.

These precedents apply with full force here. Once the police have exclusive control over a smart phone and have secured it beyond an arrestee's grab area, there is no legitimate concern that the arrestee could alter or destroy the phone's digital contents.

Faced with this actuality, the federal government offers an alternative basis to justify searching a smart phone to preserve evidence. The government contends that "[u]nlike [cigarette packages or clothes], which [can be] seized and stored while police obtain[] a search warrant to examine their contents, a significant risk exists that evidence contained on a cell phone could be destroyed *by an arrestee's confederates* before the police have the opportunity to obtain a warrant." Pet. for Cert. at 15, *United States v. Wurie*, No. 13-212 (emphasis added). More specifically, the government suggests that during the time necessary to obtain a warrant, third parties might be able to "wipe" – that is, erase – files on an arrestee's smart phone from another computer at a

remote location. *Id.* at 15-16; *see also United States v. Flores-Lopez*, 670 F.3d 803, 807-09 (7th Cir. 2012) (conveying same concern).

No such risk, however, could possibly have existed with respect to the smart phone at issue here. Petitioner's phone stored most of its data – including all photos and videos – on a removable "microSD Card." *Samsung Instinct Touchscreen Cell Phone*, Samsung, http://www.samsung.com/us/mobile/cell-phones/SPH-M800ZKASPR-specs. In fact, the user of this type of phone "*must* have a microSD memory card installed to use the Camera." Samsung Instinct User Guide 108 (2008), *available at* http://support.sprint.com/global/pdf/user_guides/samsung/instinct/samsung_instinct_ug.pdf (emphasis added). Just like similar cards commonly used in digital cameras, anyone, including a police officer, can easily eject a microSD card. And once that is done, the digital data it contains is impervious to third-party tampering.

Even apart from the specifics of petitioner's smart phone, two readily available safeguards enable the police to eliminate the risk posed by remote-wiping technology with respect to *any* cell phone. First, as several courts have recognized, preventing the phone from receiving a signal eliminates the danger of remote wiping. *See, e.g.*, *United States v. Wurie*, 728 F.3d 1, 11 (1st Cir. 2013); *Flores-Lopez*, 670 F.3d at 809. This can usually be accomplished simply by turning (or leaving) the phone off, or putting it into "airplane mode."

If officers are worried for some reason that neither of those options would be a foolproof way of preventing the phone from receiving a signal, all the

officers need to do is place the phone into a lightweight and inexpensive pouch known as a Faraday bag. *Wurie*, 728 F.3d at 11; *see also* Adam M. Gershowitz, *Seizing a Cell Phone Incident to Arrest: Data Extraction Devices, Faraday Bags, or Aluminum Foil as a Solution to the Warrantless Cell Phone Search Problem*, 22 Wm. & Mary Bill Rts. J. 601, 607 (2013) (describing Faraday bags); Amicus Br. of Elec. Privacy Info. Ctr. (same). A Faraday bag looks much like a Ziploc freezer bag (usually including a clear window), and prevents radio waves from connecting with the phone inside.

In fact, police departments across the country already use Faraday bags for just this signal-blocking purpose. For several years, the Department of Justice's Cybercrime Lab recommended that police be equipped with Faraday bags and use them whenever necessary to protect against remote wiping of Apple iPhones.[8] The California Department of Justice's Bureau of Forensic Services likewise advises officers to use Faraday bags in order to "[b]lock wireless signals" from reaching mobile devices.[9] Similar evidence of the ease and effectiveness of using Faraday bags abounds. *See* Amicus Br. of Criminal Law Profs. Consequently, if officers are truly

---

[8] *See* Dep't of Justice Computer Crime and Intellectual Prop. Section, Cybercrime Lab, Awareness Brief: Find My iPhone 3 (2009), *available at* http://cryptome.org/isp-spy/iphone-spy.pdf.

[9] Cal. Dep't of Justice, Bureau of Forensic Servs., Physical Evidence Bulletin: Digital Evidence Collection – Mobile Devices 3 (2011), *available at* http://oag.ca.gov/sites/all/files/pdfs/cci/reference/ peb_18.pdf.

concerned about the possibility of an arrestee's confederates attempting to remotely wipe a phone (a concern belied by the officers' actions here), their own training and internal procedures already tell them what to do. And once they follow that guidance, there can be no argument that searching the phone without a warrant is necessary to avoid any potential destruction of evidence.

Second, police can copy, without viewing, the contents of a smart phone so as to create a digital backup. *See Wurie*, 728 F.3d at 11. For example, a Universal Forensic Extraction Device (UFED) can "download all the photos and videos from an iPhone within ninety seconds." Gershowitz, *supra*, at 606; *see also* Christa Miller et al., *What's in an App? Extracting and Examining Mobile Device App Data*, Evidence Tech. Mag., Nov.-Dec. 2013, at 6-9 (extraction "accesses all data on the device, regardless of where it is or was stored"), *available at* http://www.nxtbook.com/nxtbooks/evidencetechnology/20131112/index.php?startid=6#/8. The police, in fact, apparently "downloaded" the data from petitioner's phone in just this manner. J.A. 14. Thus, there can be no claim that the officers lacked the opportunity to preserve all of the phone's digital contents while seeking a warrant advising which data, if any, could be inspected and which had to be left unexamined (and perhaps destroyed).

B. The Degree Of Intrusiveness Of The Search Of Petitioner's Phone Rendered The Search Unreasonable.

"As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a government search is 'reasonableness.'" *Maryland v.*

King, 133 S. Ct. 1958, 1969 (2013) (quoting *Acton*, 515 U.S. at 652). Therefore, even if searching the digital contents of a smart phone without a warrant served some legitimate law enforcement interest, the search in any given case "must [still] be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Edwards*, 415 U.S. at 808 n.9 (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)); *see also* Pet. for Rehearing En Banc at 6-7, *United States v. Wurie*, 724 F.3d 255 (1st Cir. 2013) ("In cases involving more intrusive searches of computer-like phones, the core Fourth Amendment requirement of reasonableness protects against unwarranted invasions of privacy."). This reasonableness test "requires a court to weigh 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'" *King*, 133 S. Ct. at 1970 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

Conducting an exploratory search of a smart phone's text, photographic, and video files intrudes upon personal privacy to an unprecedented degree. This is so because (1) the text, photo, and video files of modern smart phones – not to mention such phones' vast array of other files – hold exponentially greater amounts and types of sensitive personal information than any physical item an arrestee could carry on his person; and (2) much of that information, unlike typical physical items, implicates First Amendment concerns, such as free expression, private communication, and associational interests.

1. Smart Phones Hold Extraordinary Amounts Of Sensitive Personal Information.

Whether viewed in terms of the Fourth Amendment's historical purpose or modern realities, conducting an exploratory search of the digital contents of a smart phone severely impinges on personal privacy because of the massive amounts of sensitive information such devices contain.

a. The Fourth Amendment's prohibition against unreasonable searches was devised largely as a response to the infamous "general warrants" and "writs of assistance" used in England and America during colonial times. General warrants allowed British officers indiscriminately to "search[] private houses for the discovery and seizure of books and papers," as well as any other evidence, that might be used to convict their owners of crimes. *Boyd v. United States*, 116 U.S. 616, 626 (1886). Writs of assistance similarly permitted "customs officers in the early colonies . . . to rummage through homes and warehouses, without any showing of probable cause linked to a particular place or item sought." *Wurie*, 728 F.3d at 9. The Framers "despised" such searches, *King*, 133 S. Ct. at 1980-81 (Scalia, J., dissenting), "since they placed 'the liberty of every man in the hands of every petty officer,'" *Boyd*, 116 U.S. at 625; *see generally* Amicus Br. of Const. Accountability Ctr. (elaborating on this history).

Just like general warrants and writs of assistance, the California Supreme Court's categorical rule would give law enforcement access to "virtual warehouse[s]" of people's "most intimate communications and photographs" whenever

someone is subject to a custodial arrest. Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 Santa Clara L. Rev. 183, 211 (2010). The smart phone in this case, for example, could store up to eight gigabytes of information. Samsung Instinct User Guide*, supra*, at 96. "Apple's iPhone 5 comes with up to sixty-four gigabytes of storage, which is enough to hold about four million pages of Microsoft Word documents." *Wurie*, 728 F.3d at 8 (internal quotation marks and citations omitted).

Given the volume and sensitivity of information on an average person's smart phone, it would be hard to overstate the seriousness of the warrantless intrusions the California Supreme Court's rule would countenance. In text, photo, and video files alone, a typical phone contains private notes, back-and-forth conversations, and snapshots spanning several years – an array of information formerly impossible for an officer to obtain incident to an arrest. Indeed, insofar as such files reflect one's daily thoughts, wonders, and concerns, they are in many ways "an extension of [one's] mind." Stephen Shankland, *How Google Is Becoming an Extension of Your Mind*, CNET (July 16, 2012), http://news.cnet.com/8301-1023_3-57470853-93/how-google-is-becoming-an-extension-of-your-mind/. And this is to say nothing of other information – from personal calendars to banking and health records, to privileged and confidential business emails and memoranda, to historic GPS location information – that is increasingly intertwined with text and photo files by means of "alert" and "notification" protocols, as well as other data integration systems.

A modern smart phone, in short, is a compact, yet powerful, computer that happens to include a phone.[10] It is a portal into our most sensitive and confidential affairs. The digital contents of such a device should not be subject to a fishing expedition for evidence of whatever suspicious thoughts or activities an officer might discover.

b. This is not to deny that arrests have consequences, including subjecting arrestees to "reduced expectations of privacy caused by the arrest." *Diaz*, Pet. App. 35a-36a (quoting *Chadwick*, 433 U.S. at 16 n.10); *see also King*, 133 S. Ct. at 1978. But having one's expectation of privacy diminished "to a reasonable extent," *Edwards*, 415 U.S. at 809 (internal quotation marks and citation omitted), is not the same as having it completely wiped out. Therefore, while being arrested shrinks a person's privacy in, say, his clothing, *see id.*, it does not deprive him of the Fourth Amendment's core protection against general searches through his most sensitive information. And that core protection forbids the government from "rummaging through [an arrestee's] electronic private effects – a cell phone – without a warrant." *State v. Granville*, ___ S.W.3d ___, 2014 WL 714730, at *1 (Tex. Crim. App. Feb. 26, 2014). As the Texas Court of Criminal Appeals recently put it, searching a person's smart phone "is

---

[10] Indeed, "the government admitted at oral argument [in the First Circuit in *Wurie*] that its interpretation of the search-incident-to-arrest exception would give law enforcement broad latitude to search *any* electronic device seized from a person during his lawful arrest, including a laptop computer or a tablet device such as an iPad." *Wurie*, 728 F.3d at 7 (emphasis added).

not like [searching] a pair of pants or a shoe"; it is "like searching his home desk, computer, bank vault, and medicine cabinet all at once." *Id.* at *6-7. Such is the essence of a general search.

Indeed, even before the advent of digital storage devices, this Court observed in *Chimel* that "[a]fter arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant." 395 U.S. at 767 (quoting *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926) (Hand, J.)). More recently in *Gant*, this Court likewise barred exploratory searches of automobiles incident to arrest in part because "the character of that threat implicates the central concern underlying the Fourth Amendment – the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." 556 U.S. at 345 & n.5 (internal quotation marks and citation omitted).

The same reasoning applies – only more so – to rummaging at will through a smart phone that a person is carrying when arrested. Before the development of smart phones, people kept the information stored on such devices only in the most private recesses of their homes or offices, safely beyond the reach of any search that might occur incident to arrest. The protection the Fourth Amendment has always afforded to such information should not evaporate – more than two hundred years after the Founding – simply because that information can now be reduced to electronic charges in a computer chip and carried in one's pocket.

c. Practical considerations relating to the Fourth Amendment's default warrant requirement reinforce the intrusiveness of exploratory searches of smart phones incident to arrest. "A warrant serves primarily to advise the citizen that an intrusion is authorized by law and limited in its permissible scope and to interpose a neutral magistrate between the citizen and the law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'" *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667 (1989) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)); *see also United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) ("Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the [arrest] of persons accused of crime."). Consequently, the need for a warrant is greatest when an officer has vast discretion that a magistrate can limit by specifying with particularity what the officer may and may not inspect. On the other hand, "[t]he need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the 'interpo[lation] of a neutral magistrate between the citizen and the law enforcement officer.'" *King*, 133 S. Ct. at 1969-70 (alteration in original) (quoting *Von Raab*, 489 U.S. at 667).

Conducting the kind of search of a smart phone that the police conducted here obviously falls into the former category. The record does not disclose how many digital files and applications the officers searched. But we know that officers "had no idea" what they might find and looked through "a lot of stuff" – including, at a minimum, the phone's text

entries, phone numbers, and the photo and video files. BIO 12; J.A. 8, 11, 14, 20. That is more than enough to show that the officers conducted an unbounded, exploratory search of petitioner's phone for any evidence they might find to convict him of a crime.

In light of the innumerable digital files and applications that modern smart phones contain, it simply will not work to leave it to police officers to exercise discretion over which files to search, how far back in time to search, and which attachments or links to activate. Only by requiring warrants "particularly describing the place[s] to be searched," U.S. Const. amend. IV, can courts ensure that any investigative search of a smart phone "will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

2. Smart Phones Hold Information That Implicates First Amendment Concerns.

Searching the digital contents of a smart phone incident to arrest for evidence of criminality is unreasonable for another reason: it implicates constitutional interests in safeguarding private communications, as well as free expression and association, from official intrusion.

1. The Framers believed that, "[o]f all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than . . . exemption of his private affairs, books, and papers from the inspection and scrutiny of others."

Interstate Commerce Comm'n v. Brimson, 154 U.S. 447, 479 (1894) (internal quotation marks and citation omitted). That was not merely a theoretical belief; it was based on bitter experience. "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961).

In particular, "those who framed the Fourth Amendment" were keenly familiar with the infamous English cases of *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (C.P.), 19 How. St. Tr. 1153, and *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (C.P), 19 How. St. Tr. 1029. *See Boyd,* 116 U.S. at 625-27. In both cases, officers arrested publishers of opposition newspapers in their homes for seditious libel and searched and seized their private papers. *See Boyd*, 116 U.S. at 625-26 (describing *Wilkes* case); *Entick*, 95 Eng. Rep. at 807, 19 How. St. Tr. at 1030 (noting that officers "broke open, and read over, pryed into, and examined all of the private papers" in the home over a four-hour period). Emphasizing the special sanctity of private papers, Lord Camden declared the searches "totally subversive of the liberty of the subject[s]," *Wilkes*, 98 Eng. Rep. at 498, 19 How. St. Tr. at 1167, and "subversive of all the comforts of society," *Entick*, 95 Eng. Rep. at 817-18, 19 How. St. Tr. at 1066. "[E]very American statesmen" agreed with these assessments and "considered [them] as the true and ultimate expression of constitutional law" in the country's new charter. *Boyd*, 116 U.S. at 626; *see also Stanford v. Texas*, 379 U.S. 476, 484 (1965) (describing *Entick* as the "wellspring of the rights now protected by the Fourth Amendment").

In light of this history, this Court has held that the Fourth Amendment imposes "special constraints upon searches for and seizures of material arguably protected by the First Amendment." *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 n.5 (1979). In *Marcus*, 367 U.S. at 730-38, and *Stanford*, 379 U.S. at 485, for instance, this Court held that warrants allowing the search and seizure of expressive materials must specify with heightened particularity exactly what may be inspected. As the Court later explained in a case dealing with a police search of photographs: "Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field." *Zurcher v. Stanford Daily*, 436 U.S. 547, 551-52, 564 (1978). Furthermore, when seizure of materials covered by the First Amendment may prevent the dissemination of speech or other expression, a special predeprivation hearing is necessary. *See A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210-11 (1964). Finally, "[t]his Court has recognized the vital relationship between freedom to associate and privacy in one's associations," holding that people's relationships to groups involved in "political, economic, religious, or cultural matters" are entitled to remain confidential absent an especially strong governmental need for disclosure. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-62 (1958); *see also Jones*, 132 S. Ct. at 956 (Sotomayor J., concurring) ("Awareness that the

government may be watching chills associational and expressive freedoms.").[11]

The search-incident-to-arrest doctrine has had a "checkered history." *Gant*, 556 U.S. at 350. But this Court has consistently indicated that the doctrine – like the other Fourth Amendment doctrines just discussed – contains special limitations on searching expressive or associational materials. Most notably, in *Lefkowitz*, 285 U.S. at 467, this Court held that officers violated the Fourth Amendment by conducting an exploratory search of a person's books and papers in his office incident to arrest. Relying on Lord Camden's declaration in *Entick* that "one's papers are his dearest property," this Court reasoned that police officers may not search a person's private

---

[11] To the extent the cases in the preceding paragraph allow the search and seizure of private communications and other expressive documents pursuant to properly drawn warrants and other procedural protections, this jurisprudence diverges from the even stricter, original understanding of the Fourth Amendment. As originally conceived, reaffirmed in *Boyd*, and generally enforced until the 1960s, the Fourth Amendment flatly forbade the search or seizure of any private papers – regardless of any warrant or other judicial or legislative sanction – for purposes of gathering evidence to use against someone in a criminal prosecution. *See Boyd*, 116 U.S. at 622-24, 630; *see generally* Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. Crim. L. & Criminology 49, 50 (2013); Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va. L. Rev. 869, 869-70 (1985). Hence, to the extent this case turns solely on what "the Framers of the Fourth Amendment would have considered 'reasonable,'" *City of Indianapolis v. Edmond*, 531 U.S. 32, 56 (2000) (Thomas, J., dissenting), it is a straightforward case and reversal is required.

papers incident to arrest to find evidence of the crime of arrest or some other crime. *Lefkowitz*, 285 U.S. at 464-66.

Other decisions over the years have implicitly recognized the unreasonableness of searching personal communications incident to arrest. In *Harris v. United States*, 331 U.S. 145, 154 (1947), this Court held that the Fourth Amendment permitted police officers to inspect and seize an envelope containing draft cards from a drawer in an arrestee's apartment. This Court, however, emphasized that "[c]ertainly this is not a case of search for or seizure of an individual's private papers." *Id.* at 154 & n.18. When this Court later overruled *Harris*, it cited with approval Judge Learned Hand's opinion for the Second Circuit in *Kirschenblatt*, 16 F.2d at 203. *See Chimel*, 395 U.S. at 767-68. Judge Hand explained in that opinion that "the whole of a man's correspondence, his books of account, the record of his business, in general, the sum of his documentary property . . . are as inviolate upon his arrest as they certainly are upon search warrant." *Kirschenblatt*, 16 F.2d at 204; *see also* Taylor, *supra*, at 70 ("There is no good reason why a diary or personal letter, otherwise immune, should be subject to seizure when found on the arrestee's person.").

The problem with exploratory searches through even tangible private papers is that they invariably expose protected expression and communications to governmental scrutiny. As Judge Friendly put it years ago, "The reason why we shrink from allowing a personal diary to be the object of a search is that the entire diary must be read to discover whether

there are incriminating entries." *United States v. Bennett*, 409 F.2d 888, 897 (2d Cir. 1969). The same problem inheres in "'rummaging' through the contents of a desk to find an incriminating letter." *Id.*; *see also* Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va. L. Rev. 869, 918 (1985) ("Because papers cannot be so easily distinguished from each other, a typical search is necessarily a rummaging search of the most intrusive kind."). Private papers, in short, reside at the apex of our privacy hierarchy, so it is unreasonable for police officers to examine such documents in conjunction with an arrest beyond the degree to which necessary to ensure that they do not hold any weapons or other threatening physical items.

2. For the same reasons, it is unreasonable for the police to conduct an exploratory search of the digital contents of a smart phone seized incident to arrest. *See* Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. Crim. L. & Criminology 49, 109 (2013). Conducting such a search is the modern counterpart to examining "the whole of a man's correspondence, his books of account, the record of his business, in general, the sum of his documentary property." *Kirschenblatt*, 16 F.2d at 204. Even when the police limit their search (as they may have done here) to a phone's photo, video, and certain text files, the intrusion is still dramatic and wide-ranging. Such files hold personal, often intimate, material that people may not have even ventured to capture in

visible form before the advent of smart phones.[12] Indeed, as this Court observed a few Terms ago, "[c]ell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification." *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010).

Searching through photographs, videos, contacts lists, text messages, and other material in smart phones also presents insoluble associational risks. Photographic material, by its very nature, tends to reveal one's personal and professional relationships. Contacts lists and email groups show one's web of connections even more holistically. Text messages can be similarly revealing. Finally, the very existence of certain applications on a smart phone – imagine, for instance, an icon on a phone's home screen for the Libertarian Party, the Nation of Islam, or Greenpeace – can disclose one's most sensitive memberships and beliefs.

The search of petitioner's smart phone implicated nearly all of these concerns. The police searched the digital contents of petitioner's smart phone because

---

[12] It bears remembering that when the police are allowed to rummage through such material, the risk is not only that they will see potentially embarrassing, politically sensitive, or confidential business documents. They may also disseminate or otherwise misuse the information they discover. *See, e.g.*, *Newhard v. Borders*, 649 F. Supp. 2d 440, 443-44 (W.D. Va. 2009) (noting that after the police arrested a school teacher for a DUI, they searched his cell phone and found sexually explicit photos of him and his girlfriend and then shared the photos with other officers and members of the public).

they wanted to look around for evidence of criminality. J.A. 23. What is more, there was nothing targeted about the search. Detective Malinowski rifled through pictures, watched videos to see what might "ca[tch] [his] eye," and scanned phone numbers in order to discover – among other things – petitioner's connections. *Id.* 8, 30. Such exploratory searches of expressive and associational material strike at the heart of the Fourth Amendment and cannot be countenanced.

C. Limiting Searches Of Smart Phones To Situations In Which Officers Believe Such Phones Contain Evidence Of The Crime Of Arrest Would Not Solve The Constitutional Problems Inherent In Such Searches.

Although the California Court of Appeal and trial court rested their rulings here exclusively on the California Supreme Court's categorical ruling that police may always rummage through any smart phone seized from an arrestee, *see* Pet. App. 15a; J.A. 26, the trial court observed at one point that the gang detective who conducted the exploratory search of petitioner's phone "testified that in his experience persons and gang members do take photos of themselves and their crimes and he expected there could be such photos on the cell phone." J.A. 23. Nothing about this testimony, however, legitimized the search in this case. This Court held in *Gant* that "when it is reasonable to believe evidence relevant to the crime of arrest might be found in [a] vehicle," police may lawfully search the automobile incident to arrest. 556 U.S. at 343 (internal quotation marks and citation omitted). But, contrary to the federal

government's argument, *see* Pet. for Cert. 18, *United States v. Wurie*, No. 13-212, that holding does not apply to cell phones – and even if it did, the reasonable belief standard would not be satisfied here.

1. *Gant*'s reasonable belief rule derives from "circumstances *unique* to the vehicle context." 556 U.S. at 343 (emphasis added). Three such circumstances bear emphasis here. First this Court has long recognized that, because of their inherent mobility, automobiles "can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll v. United States*, 267 U.S. 132, 153 (1925). Even when placed in impound lots, vehicles are "susceptible to theft or intrusion by vandals." *Chadwick*, 433 U.S. at 13 n.7. Second, "[t]he search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building" because an automobile "seldom serves as one's residence or as the repository of personal effects." *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (internal quotation marks and citation omitted). Third, individuals have a reduced expectation of privacy in an automobile "owing to its pervasive regulation." *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam) (citing *California v. Carney*, 471 U.S. 386, 391-92 (1985)). After all, automobiles "are subjected to police stop and examination to enforce 'pervasive' governmental controls '[a]s an everyday occurrence.'" *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (alteration in original) (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)).

Not one of these circumstances is present when the police have seized a smart phone from an arrestee. First, once reduced to police control, a smart phone cannot disappear and is easily secured against theft or vandalism. Second, a modern cell phone's primary use is as a repository of private papers and information – "the kind of information one would have previously stored in one's home," *Wurie*, 728 F.3d at 8, not in one's car. Put another way, most people regularly allow others to see the interior and contents of their cars, *see Cardwell*, 417 U.S. at 590-91, but not their phones. Third, police officers do not regularly review the content of text, photo, or video files on smart phones for any regulatory or administrative purpose.

In sum, automobiles hold a singular place in Fourth Amendment law. There is no good reason to extend *Gant*'s reasonable belief exception beyond that context – let alone to a context as dramatically different as smart phones.

2. What is more, applying *Gant*'s reasonable belief exception to smart phones would swallow any general rule banning such warrantless searches incident to arrest. In *Gant*, this Court perceived the reasonable belief exception as a genuine exception to the warrant requirement, noting that "[i]n many cases . . . there will be no reasonable basis to believe the vehicle contains relevant evidence." 556 U.S. at 343. By contrast, precisely because of the wealth of information contained on smart phones, it is difficult to imagine a crime of arrest where police could not at least claim to believe a phone would contain relevant evidence.

Consider the files we know the police examined in this case. People now take photos and videos of themselves (sometimes called "selfies") and their activities on a daily, if not hourly, basis.[13] People create and receive text entries even more often. Insofar as such pictures and words continually document one's daily doings and whereabouts, they are inherently likely to interest officers investigating potential criminal behavior. Similarly, phone numbers stored in one's contacts folder and call logs list one's acquaintances and catalogue one's interactions with them. An arresting officer, therefore, might think that such folders and logs are inherently subject to warrantless inspection because they identify potential witnesses for investigating and prosecuting the crime of arrest.

The phone seized from petitioner – like all smart phones – also contained other tools and sensors that collect and store data on users. For example, petitioner's smart phone collected and stored GPS location data. Samsung Instinct User Guide, *supra*, at 200. Such data generates a historical record of the owner's movements, *see Jones*, 132 S. Ct. at 963 (Alito, J., concurring in judgment), such that it might reveal the speed at which his car was traveling before being pulled over or whether he stopped on the way home from work to have a couple drinks. Internet

---

[13] *See* Molly Wood, *Narcissist's Dream: Selfie-Friendly Phone*, N.Y. Times, Feb. 6, 2014, at B1; *Digital Photos Taken by Americans*, Nat'l Geographic, April 2012, at 35.

browsers store users' search histories and product purchases. The list goes on and on.[14]

The point is that when almost all aspects of a person's life are channeled through a single device, a curious police officer will virtually always be able to assure himself that he has reason to believe that an arrestee's smart phone contains evidence of the crime(s) of arrest. And if all it takes for an officer to conduct a warrantless, exploratory search is such an assurance with respect to *something* that might be *somewhere* on the phone, then the federal government's *Gant*-based argument is really no different from the California Supreme Court's position that officers should always be able to search smart phones seized from arrestees.

If anything, a *Gant*-based regime would be worse. By holding out a promise restricting law enforcement authority to search smart phones, a *Gant*-based regime would encourage defendants always to challenge whether (or to what extent) the reasonable-belief standard was satisfied in their cases. Yet because those legal limits would be largely illusory, almost all of this litigation would ultimately be for naught.

---

[14] In addition to GPS data, more recent smart phones include other sensors such as a compass, accelerometer, gyroscope, fingerprint reader, proximity sensor, barometer, thermometer, and humidity sensor. *See, e.g.*, *Apple – iPhone 5s – Technical Specifications*, Apple, http://www.apple.com/iphone-5s/specs/; *Samsung Galaxy S4 – Life Companion*, Samsung, http://www.samsung.com/ global/microsite/galaxys4/.

3. The facts of this case reinforce how inappropriate it would be to apply *Gant*'s reasonable belief rule to the context of smart phones. Petitioner was arrested for concealing a firearm within a vehicle and carrying a loaded weapon. *See* Cal. Penal Code § 12025(a)(1) (current version at § 25400(a)(1)); Cal. Penal Code § 12031(a)(1) (current version at § 25850(a)(1)). As summarized by the trial court, the officer who searched petitioner's phone "testified that in his experience persons and gang members do take photos of themselves and their crimes and he expected there could be such photos on the cell phone." J.A. 23.

Petitioner believes that this assertion falls short of constituting a "reasonable belief" that evidence of petitioner's crime of arrest would be found on his smart phone. After all, the officer's testimony really amounts to nothing more than an assertion that people often take pictures of themselves doing the things they do. But if the State argues the *Gant* standard is satisfied here, that argument would simply illustrate how ill-suited to the digital contents of smart phones any reasonable belief test would be. Surely the proposition that human beings often take photos of themselves – or its equivalent with respect to text entries, GPS data, or other information stored on smart phones – should not be enough to justify dispensing with a default warrant requirement.

II. The Search Of Petitioner's Phone At The Stationhouse Was Too Remote From His Arrest To Qualify As A Search Incident To Arrest.

The search of petitioner's smart phone at the stationhouse, during which the officers found the videos and photographs that the prosecution later introduced into evidence, violated the Fourth Amendment for another reason: a search of an item two hours after an arrest at a police station is not truly "incident" to arrest. In fact, numerous lower courts already have held as much in cases indistinguishable from this one.[15]

1. This Court has repeatedly emphasized that "a search 'can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest.'" *Shipley v. California*, 395 U.S. 818, 819-20, (1969) (per curiam) (quoting *Stoner v. California*, 376 U.S. 483, 486 (1964)); *accord New York v. Belton*, 453 U.S. 454, 457, 462 (1980); *Roaden v. Kentucky*, 413 U.S. 496, 497 (1973); *Preston v. United States*, 376 U.S.

---

[15] *See United States v. Gibson*, No. CR 11-00734 WHA, 2012 WL 1123146, at *9-10 (N.D. Cal. 2012) (search of phone "one or two hours after arresting defendant" was too remote from arrest to be "incident" to it); *United States v. DiMarco*, No. 12 CR 205(RPP), 2013 WL 444764, at *10-12 (S.D.N.Y. 2013) (six-hour delay; same result); *United States v. Yockey*, No. CR09-4023-MWB, 2009 WL 2400973, at *5 (N.D. Iowa 2009) (search after defendant was booked in jail; same result), *report and recommendation adopted*, 654 F. Supp. 2d 945; *State v. Isaac*, 209 P.3d 765, No. 101,230, 2009 WL 1858754, at *5 (Kan. Ct. App. 2009) (search "more than an hour after Isaac's arrest while Isaac was being booked into jail"; same result).

364, 367 (1964); *Agnello v. United States*, 269 U.S. 20, 30-31 (1925). If the search is "remote in time or place from the arrest," the search-incident-to-arrest-doctrine no longer justifies it. *Preston*, 376 U.S. at 367.

The reason for these limitations is simple: the search-incident-to-arrest doctrine is designed to protect law enforcement's interests in disarming arrestees and preventing them from destroying evidence. Once the police accomplish these tasks by seizing any items of interest at the scene and retreating to the safety of the police station, neither of those interests retains any force – and a warrantless search, therefore, becomes unreasonable absent some other justification. *See Preston*, 376 U.S. at 367; *see also Bailey v. United States*, 133 S. Ct. 1031, 1042-43 (2013) (once justifications for an exception to the warrant requirement vanish, so does police authority to conduct a warrantless search)*;* *Arizona v. Gant*, 556 U.S. 332, 338-39 (2009) (same).

Two decisions from this Court illustrate this point and, for all practical purposes, dictate the outcome here. First, in *Preston*, officers arrested a man who was standing next to his car. 376 U.S. at 365. The Court "assume[d]" that "the police had the right to search the car when they first came on the scene." *Id.* at 367-68. But instead of doing so, the police simply seized the car and took it (along with the defendant) to the police station. *Id.* at 365. Soon after the defendant was booked, the officers conducted a general search of the car and discovered evidence of additional crimes. *Id.*

This Court held unanimously that "the search was too remote in time or place to have been made as

incidental to the arrest and . . . therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment." *Preston*, 376 U.S. at 368. As this Court succinctly explained, "[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Id.* at 367. This is especially so when the accused is safely detained at the station house and the police have exclusive control over the items they wish to search. Under those circumstances, this Court stressed, there can be no argument that the accused might gain access to the property and obtain a weapon or "destroy[] any evidence of a crime." *Id.* at 368.

Four years later, this Court reiterated this limitation on the search-incident-to-arrest doctrine in *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968). There, as in *Preston*, the police arrested a person for a traffic offense and took him and his car to the county jail. *Id.* at 218-19. With the arrestee in custody inside, officers searched the vehicle. *Id.* at 219. This Court again held with little difficulty that the search violated the Fourth Amendment. *Id.* at 220. Drawing on *Preston*, this Court reasoned that "under such circumstances, a search is 'too remote in time or place to [be] incidental to the arrest.'" *Id.* (quoting *Preston*, 376 U.S. at 368).

This Court later limited the reach of *Preston* and *Dyke* with respect to vehicles, holding that the "automobile exception" allows officers to conduct delayed searches of cars seized at the time of arrest, when there is probable cause to believe the cars contain evidence of illegality. *See Chambers v.*

Maroney, 399 U.S. 42, 52 (1970). But the remoteness principle otherwise has retained its vitality. In *United States v. Chadwick*, 433 U.S. 1 (1977), for instance, this Court explained that "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest.'" *Id.* at 15 (quoting *Preston*, 376 U.S. at 367). Accordingly, this Court held that the search of an arrestee's footlocker at the stationhouse "more than an hour after [the] agents had gained exclusive control" over it could not "be viewed as incidental to the arrest." *Id.*; *see also Cardwell v. Lewis*, 417 U.S. 583, 591 n.7 (1974) (holding that a "difference in time and place eliminates any search-incident-to-an-arrest contention"). Similar lower court decisions abound.[16]

---

[16] In one leading case, the D.C. Circuit (per Judges Randolph, Mikva, and Silberman), held that a search of an arrestee's suitcase between thirty and sixty minutes after arrest was too remote to be incident to arrest. *United States v. $639,558 in U.S. Currency*, 955 F.2d 712, 716-17 & n.7 (D.C. Cir. 1992). For equivalent decisions, see *United States v. Butler*, 904 F.2d 1482, 1484-85 (10th Cir. 1990) (jewelry box); *United States v. Vasey*, 834 F.2d 782, 787-88 (9th Cir. 1987) (luggage); *United States v. Montalvo-Cruz*, 662 F.2d 1285, 1290 (9th Cir. 1981) (purse); *United States v. Schleis*, 582 F.2d 1166, 1172 (8th Cir. 1978) (locked briefcase), *abrogated on other grounds by United States v. Morales*, 923 F.2d 621 (8th Cir. 1991); *Commonwealth v. Pierre*, 893 N.E.2d 378, 384 (Mass. App. Ct. 2008) (plastic bags that arrestee was carrying); *State v. Murray*, 605 A.2d 676, 680 (N.H. 1992) (purse); *People v. Redmond*, 390 N.E.2d 1364, 1374 (Ill. App. Ct. 1979) (purse).

The search-incident-to-arrest doctrine's remoteness limitation applies with full force to the police's search of the photo and digital files of petitioner's smart phone. When Officer Malinowski commenced that search, petitioner had been under arrest for "about two hours." BIO 2. He had been booked and was securely in police custody. And the officers had petitioner's smart phone exclusively in their possession at the station house with no chance whatsoever that petitioner could gain access to it. If the police were concerned that any digital evidence contained in the phone might evaporate, all the officers had to do was simply freeze the phone's contents by placing it in a Faraday bag or similar device, or download them to a secure place pending a request for a search warrant. *See supra* at 22-24. Because the police took neither of these steps, the station house search of the phone was unreasonable.

2. The California Supreme Court has resisted this analysis, contending that this Court's decision in *United States v. Edwards*, 415 U.S. 800 (1974), permits "delayed" searches of items seized incident to arrest whenever those items were taken from the person of (in contrast to the immediate vicinity of) the arrestee. *Diaz*, Pet. App. 33a & n.5. The California Court of Appeal thus held in this case that the remoteness in time and space of the officers' search of petitioner's smart phone was irrelevant. Pet. App. 15a.

This reasoning overreads *Edwards*. In that case, the police arrested the defendant for attempted breaking and entering and placed him in jail. 415 U.S. at 801. Several hours later, the police learned that the shirt he was still "wearing at the time of and

since his arrest," might contain paint chips constituting useful evidence against him. *Id.* at 802. The police thus directed him to remove the shirt and examined it for paint chips. *Id.* This Court held that the seizure and examination of the shirt were reasonable. *Id.* at 803. Quoting this Court's earlier decision in *Abel v. United States*, 362 U.S. 217 (1960), this Court explained that "when the accused decides to take the property with him" after being arrested, it does not contravene the Fourth Amendment for the police to seize and search the property "at the first place of detention." *Edwards*, 415 U.S. at 803 (quoting *Abel*, 362 U.S. at 239) (internal quotation marks omitted).

The *Edwards* rule permitting officers to seize and inspect items on an arrestee's person at the police station thus turns not on whether the property was immediately associated with the arrestee's person *at the time of arrest*, but rather on the more specific inquiry whether the property was *still "in his possession at the place of detention."* *Id.* at 807 (emphasis added). This makes perfect sense. When "the accused decides to take property with him" to the police station, *id.*, then it is possible right up until the time of the search that he might use the property as a weapon or as a tool for attempting an escape. By contrast, when the police seize property at the scene, neither possibility exists later at the police station while the property is "under the exclusive dominion of police authority," *Chadwick*, 433 U.S. at 15, and the arrestee is in a jail cell.

To be sure, there is a sentence in *Edwards* suggesting that the Fourth Amendment permits searches of clothing or effects immediately associated

with an arrestee's person to be conducted even "at a later time" than the initial seizure. 415 U.S. at 807. This does not seem to describe what occurred in *Edwards*; as far as can be gleaned from this Court's opinion, the police there seized the arrestee's clothing and then examined it right away for the presence of paint chips.[17] At any rate, *Edwards*' tolerance for delayed searches emanates not from search-incident-to-arrest jurisprudence but rather – as *Edwards* itself indicated – from the inventory-search doctrine first enunciated in *Cooper v. California*, 386 U.S. 58 (1967); *see also Edwards*, 415 U.S. at 806 (citing and discussing *Cooper*). Under that doctrine, the police may search an arrestee's items at any point after their seizure in order to "inventory property found on the person" who has been put in jail. *Illinois v. Lafayette*, 462 U.S. 640, 646-47 (1983). That is, the authority that *Edwards* describes to conduct delayed searches flows not from the accused's arrest, but rather from his "administrative processing," *Edwards*, 415 U.S. at 807.

That authority is immaterial here. The trial court expressly found that the search was "investigative," not administrative, in nature. J.A. 23. The State has never challenged that finding. Nor has the State ever suggested that searching the

---

[17] Even if the police conducted a search of the clothing some period of time after seizing it, the defendant never challenged any such search apart from the seizure itself.

digital contents of a smart phone could ever be justified on the basis of an inventory search.[18]

Any rule subjecting property seized at the scene from the arrestee's person – but not property that was then merely in his grab area – to delayed investigative searches would also lead to intolerably arbitrary results. Under such a rule, the police could conduct delayed searches of the digital contents of any cell phone taken from someone's hands or pockets. But if, for example, the police arrested someone in her office at a moment when the arrestee's cell phone was sitting on her desk, then no delayed search would be permissible. Or if police arrested the driver of a car, they might be unable to conduct a delayed search of a phone resting in a cupholder. Exploratory governmental access to the most sensitive details of a person's private life should hinge on more than such happenstance.

3. One final reason – unique to smart phones and other devices with access to cellular signals – exists for strictly enforcing the remoteness limitation on

---

[18] Nor would any such suggestion have any merit. It fully serves the police interest in conducting an inventory of all seized items to create a list of all *physical* items (including any smart phone itself) seized from an arrestee; the police need not read through "materials such as letters or checkbooks that touch upon intimate areas of an individual's personal affairs," much less digital records of such communications and records. *South Dakota v. Opperman*, 428 U.S. 364, 380 & n.7 (1976) (Powell, J., concurring) (internal quotation marks and citation omitted); *see also D'Antorio v. State*, 926 P.2d 1158, 1162-64 (Alaska 1996) (collecting other authorities); *State v. Davis*, 742 P.2d 1356, 1360-61 (Ariz. Ct. App. 1987) (diary).

searches incident to arrest in this context. When the police seize a package containing purely physical contents, the contents of that package will be exactly the same later at the police station as they were when seized in the field at the time of arrest. By contrast, if, after seizing a smart phone, a police officer forgets or decides not to immediately block it from receiving a signal, the digital contents of the phone will likely *not* be the same later at the police station. Here, for example, the police waited some two hours to resume searching petitioner's smart phone, and there is no indication that they ever disconnected the phone from its network. A typical person receives several emails and text messages per hour, not to mention voice mails and alerts from other applications synching with the internet.

Hence, even if the California Supreme Court were correct, as a general matter, that the search-incident-to-arrest doctrine allows police officers to conduct delayed searches of personal items seized at the time of arrest, that rule could not be applied to smart phones. There is no conceivable reason why seizing a device at the time of arrest should allow the police to use that device to gather and review new information that did not even exist when the device was seized. Indeed, using an arrestee's smart phone to retrieve and inspect such new information without a warrant may implicate not only the Fourth Amendment, but also federal wiretapping statutes, *see* 18 U.S.C. §§ 2511-2522 (making it unlawful for governmental entities to intercept wire communications without meeting a series of statutory requirements), and the Stored Communications Act, *see* 18 U.S.C. §§ 2701, 2703(a) (making it unlawful for governmental entities to retrieve electronic

communications, such as email, from service providers without a warrant).

It is unclear in this case whether the police viewed any information on petitioner's smart phone that came into existence after his arrest. Presumably the photos and videos that the prosecution ultimately introduced into evidence were on the phone before petitioner was arrested. But even these types of digital files on certain smart phones can automatically pull down new information from the "cloud" or other computers. *See, e.g.*, *iCloud Photo Sharing*, Apple, https://www.apple.com/icloud/icloud-photo-sharing.html (describing Apple service that synchronizes a photo and video stream across multiple devices and even across multiple users). And it can be extremely difficult to decipher which files on a smart phone are sealed off from the outside world and which – if left connected to a signal – continually accumulate new information from the internet at large. This reality provides all the more reason why it is vital that the Fourth Amendment incentivize police officers to freeze immediately the contents of smart phones seized incident to arrest – and to require them to seek particularized approval from a magistrate before inspecting any digital files.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

Jeffrey L. Fisher
Counsel of Record
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

Patrick Morgan Ford
LAW OFFICE OF PATRICK
MORGAN FORD
1901 First Avenue
Suite 400
San Diego, CA 92101

Donald B. Ayer
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001

March 3, 2014